No. 87-1241

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,
v.
UNION GAS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE CHEMICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Of Counsel:
DAVID F. ZOLL
BARBARA A. HINDIN
CHEMICAL MANUFACTURERS ASSOCIATION
2501 M Street, N.W.
Washington, D.C. 20037
(202) 887-1350

July 11, 1988

NEIL J. KING
CAROL F. LEE *
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for the Chemical Manufacturers Association

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF FOR THE CHEMICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The Chemical Manufacturers Association (CMA) is a nonprofit trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States. CMA member companies are major contributors to the federal Superfund trust fund and are involved in hazardous waste cleanup actions at numerous sites around the country. On the basis of its experience in Superfund matters, CMA has concluded that state liability to private parties is an essential element in a well-balanced and workable cleanup program. The Court's decision in this case regarding liability of states to suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[2] will directly affect the interests of CMA's members and the fairness and efficiency of the federal hazardous waste cleanup program.

SUMMARY OF ARGUMENT

1. When Congress enacted CERCLA in 1980, it intended to permit private parties to recover cleanup costs from states whenever they fall into one of the categories of responsible parties, including "owners and operators," defined by the statute. In prior proceedings in this case,[3] however, the Court of Appeals dismissed respondent's third-party complaint against Pennsylvania, which owned

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[1] By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

[2] Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. § 9601 *et seq.* (1982), as amended by the Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[3] *United States v. Union Gas Co.*, 792 F.2d 372 (3d Cir. 1986), Pet. App. 74a-138a *(Union Gas I)*, *vacated and remanded sub nom. Union Gas Co. v. Pennsylvania*, 107 S. Ct. 865 (1987).

the site in question and allegedly caused the release of hazardous substances from the site. In response, in 1986, Congress amended CERCLA's definition of "owner or operator" to correct the Court of Appeals' interpretation of the 1980 statute. Pub. L. No. 99-499, § 101(b), codified at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1988). Even under a rigorous application of the "clear statement rule," the 1986 amendments are sufficiently clear to abrogate a state's immunity when the state caused or contributed to the release of a hazardous substance at a site that it owns or operates.

2. Since *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court has held that a state enjoys immunity from suits brought by its own citizens in federal court on a federal cause of action. The historical record shows clearly, however, that *Hans* was wrongly decided. The Eleventh Amendment limited federal court jurisdiction over state-citizen diversity suits to suits by states as plaintiffs, but left undisturbed the Article III jurisdiction of federal courts over federal question suits against states. It is time for this Court to overrule *Hans*, thereby restoring Article III and the Eleventh Amendment to their intended meanings.

The principles underlying *stare decisis* do not require this Court to perpetuate its historical errors concerning the Eleventh Amendment. States have no vested interest in violating federal law, and existing sovereign immunity doctrine is too unpredictable to give rise to stable expectations regarding the financial consequences of noncompliance. In addition, the great majority of states have recognized that sovereign immunity produces unjust results and have renounced the defense in their own courts. Within the federal system, the excessively broad interpretation of sovereign immunity originated in *Hans v. Louisiana* is inconsistent with more recent developments in related areas of the law.

3. Even if the Eleventh Amendment is held to apply generally to federal question cases, Congress may abrogate sovereign immunity without the state's consent when it enacts legislation under its Article I powers. To the extent that the Constitution granted lawmaking powers to the federal government, it divested the states of sovereignty—the conceptual basis for sovereign immunity. Private suits against states for money damages are often necessary to implement federal statutory policies and to vindicate the supremacy of federal law. Once Congress has authorized such suits, there should be no further requirement of actual or constructive waiver of immunity by the state.

ARGUMENT

I. Congress Unequivocally Expressed Its Intent to Permit Private Parties to Recover Cleanup Costs from States That Own or Operate Hazardous Waste Sites and Cause or Contribute to the Release of Hazardous Substances.

Acting pursuant to its Commerce Clause powers, Congress enacted CERCLA in 1980 to meet a perceived need for the cleanup of inactive hazardous waste sites. CERCLA rests on the fundamental principle that responsible parties, if they can be identified, should bear the costs of cleaning up a facility from which there is a release or threatened release of a hazardous substance.[4] Responsible parties include "any person owning or operating" such a facility and "any person" who generated or transported hazardous wastes that were dumped at the facility. 42 U.S.C. §§ 9601(20)(A)(ii), 9607(a) (1982). The statutory definition of "person" expressly includes states and other governmental entities, including the United States itself. *Id.* § 9601(21).

In the present case, petitioner, the Commonwealth of Pennsylvania, asks this Court to upset the carefully crafted Congressional scheme by erecting a constitutional barrier that would allow a state to escape liability to private parties for money damages or contribution, even in

[4] *See* S. Rep. No. 848, 96th Cong., 2d Sess. 33-34 (1980).

situations where the state concedes that it is a responsible party which caused or contributed to the release of hazardous substances at a site that it owns or operates. Acceptance of this position could seriously impair the fair and efficient implementation of CERCLA.

To a large extent, success in the effort to clean up our nation's hazardous waste sites depends on voluntary actions undertaken either by responsible parties, who might otherwise be compelled to conduct or pay for the cleanup of a particular site, or by innocent parties, whose property has been contaminated by the release of hazardous substances from a site with which the party has no connection. To encourage voluntary cleanup activity, Congress provided a right to recover cleanup costs, or to seek contribution, from all responsible parties. *See* 42 U.S.C.A. §§ 9607(a), 9613(f)(1) (West Supp. 1988).

Immunizing states against suits brought by private parties seeking money damages or contribution under CERCLA would strongly discourage private parties from undertaking voluntary cleanup actions or entering into settlement agreements whenever a state is a responsible party at a site, particularly if the state is one of the few responsible parties with substantial assets from which compensation might be sought. By the same token, if granted constitutional immunity from suit, states would have a strong incentive not to participate in voluntary cleanup activity but, instead, to remain on the sidelines, hoping that private parties will perform or pay for the cleanup and then be barred from recovering a pro rata share from the state. In short, the position Pennsylvania urges upon the Court could seriously frustrate our nation's ability to achieve the prompt and efficient cleanup of hazardous waste sites contemplated by Congress. Moreover, it would be grossly unfair and radically inconsistent with the statutory scheme that Congress believed it had enacted into law.

For almost six years, Congress reasonably assumed that the 1980 legislation subjected states, like all other

responsible parties under CERCLA, to private actions for cleanup costs in appropriate cases. States, after all, were expressly included within the statutory definition of "person" and thus could logically be presumed to share the same sorts of liability as other responsible parties under the Act.

In June 1986, however, a divided panel of the United States Court of Appeals for the Third Circuit held that respondent Union Gas Company could not file a third-party complaint against the Commonwealth of Pennsylvania for its share of the cost of cleaning up a hazardous waste site that it owned. Union Gas alleged that the state's actions had caused the release of hazardous wastes at the site, which the state had acquired voluntarily from the local government. According to the Court of Appeals, however, the suit was barred by the Eleventh Amendment because CERCLA, as enacted in 1980, did not spell out with sufficient clarity that Congress intended to allow private parties to recover cleanup costs from states.[5]

Congress acted promptly to remedy the problem created by the Third Circuit's decision on owner and operator liability in *Union Gas I*. At the time of that decision, the Senate and House versions of a CERCLA reauthorization bill were being considered in conference committee. The Senate bill, presupposing that states were liable as "owner[s] or operator[s]" under the 1980 Act, contained a provision designed to limit their liability in that capacity by redefining the term "owner or operator" so as to exclude a state or local government that had acquired a hazardous waste site involuntarily by virtue of its func-

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[5] *Union Gas I*, Pet. App. 97a-117a. The Court of Appeals found that the 1980 statute did not satisfy the "clear statement rule" set forth by this Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Whether or not that holding was correct, it was mooted by the CERCLA amendments enacted in 1986. Moreover, if this Court holds that state sovereign immunity does not extend to private suits under CERCLA, *see infra*, the "clear statement rule" is inapplicable and private parties may recover cleanup costs from states whenever they are responsible parties.

tion as sovereign.[6] In the wake of the *Union Gas I* decision, the conference committee, while accepting the Senate limitation, added language designed to make clear that a private party may sue a state in federal court to recover cleanup costs in all cases where the state has "caused or contributed to" the release of a hazardous substance at a facility that it owned or operated. The conference committee language provided that such a state or local government is "subject to the provisions of . . . [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107," even if it acquired the property involuntarily. Pub. L. No. 99-499, § 101(20)(D), codified at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1988).[7] Virtually identical language in the 1980 and 1986 legislation subjects the federal government to private damage suits in federal court.[8]

As the United States observed when it recommended that this Court remand *Union Gas I* for reconsideration in light of the 1986 amendments: "This new legislation

[6] 131 Cong. Rec. S12,185 (daily ed. Sept. 26, 1985). Senator Stafford, cosponsor of the amendment, told the Senate that the "amendment does not diminish the liability of these governments with respect to sites which they might have owned or operated in their own right." *Id.* at S11,619 (daily ed. Sept. 17, 1985).

[7] The conference report explained that the definition of "owner or operator" was being modified "to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, both procedurally and substantively, as any non-governmental entity, including liability under section 107 and contribution under section 113." H.R. Rep. No. 962, 99th Cong., 2d Sess. 185-86 (1986).

The 1986 amendments codified the judicially-recognized right of contribution, which Congress and the Administration deemed necessary to distribute losses fairly and to encourage prompt cleanup efforts. 42 U.S.C.A. § 9613(f) (West Supp. 1988); H.R. Rep. No. 253 (Part 1), 99th Cong., 1st Sess. 79-80, 136 (1985). Contribution actions, like other suits brought under CERCLA, are within the exclusive jurisdiction of the federal courts. 42 U.S.C. § 9613(b) (1982).

[8] Pub. L. No. 99-499, § 120(a)(1), codified at 42 U.S.C.A. § 9620(a)(1) (West Supp. 1988); *see* 42 U.S.C. § 9607(g) (1982).

. . . directly addresses the question of state immunity, and authorizes suits against states or local governments for liability or contribution when such entities caused or contributed to the release or threatened release of a hazardous substance." [9]

Petitioner, which voluntarily acquired the property at issue in this case, attempts to escape the reach of the 1986 amendment by claiming that the liability language refers only to state governments that have acquired sites involuntarily.[10] This proposed reading distorts the overall structure and language of the statute and makes absolutely no sense as a matter of policy. It is difficult to conceive of any reason to impose liability on a state that "caused or contributed" to the release of a hazardous substance at a site it acquired *involuntarily* by virtue of its sovereign functions, while exonerating a state that "caused or contributed" to the release of a hazardous substance at a site it acquired *voluntarily*. To the contrary, as one would expect, Congress has been quicker to impose liability in the case of a voluntary acquisition. For example, 42 U.S.C. § 9601(35)(A)(ii) allows a governmental entity that acquired a site involuntarily or through the exercise of eminent domain to qualify for the so-called "innocent purchaser" defense more readily than a state that acquired a site voluntarily.[11]

[9] Brief for the United States as Amicus Curiae at 5-6, *Union Gas I* (No. 86-597) (U.S., filed Dec. 11, 1986), *vacated and remanded*, 107 S.Ct. 865 (1987).

[10] Petitioner also claims that Congress did not abrogate state immunity even in this narrow category of instances, because the provision does not include the words "Eleventh Amendment," even though it subjects states to "liability under section 107" "in the same manner . . . as any nongovernmental entity." Pub. L. No. 99-499, § 101(20)(D), codified at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1988). If this remarkable assertion were accepted, the final clause of § 101(20)(D) would be meaningless.

[11] *Compare* 42 U.S.C.A. § 9601(35)(A)(ii) *with id.* § 9601(35)(A)(i) (West Supp. 1988). In any event, if the defendant "caused or contributed" to release of a hazardous substance, it forfeits the

In the 1986 amendments, Congress also added an exception to state liability that would be superfluous if, as petitioner asserts, the amended definition of "owner or operator" authorizes private damage suits only against states that acquired property involuntarily and caused or contributed to the release of hazardous substances. Section 104(j)(3), added in 1986, specifies that when the federal government acquires an interest in real property in order to conduct a hazardous waste cleanup and subsequently transfers the property to a state pursuant to a contract or cooperative agreement, the state will not be liable under CERCLA "solely as a result of acquiring an interest in real estate under this subsection." 42 U.S.C.A. § 9604(j)(3) (West Supp. 1988). In this situation, the state acquired the property *voluntarily* and is not likely to be sued by the federal government, which had transferred the property to the state. Thus, Congress must have believed the exemption was necessary to protect states against suits by private parties.

In short, petitioner's suggestion that Congress limited its 1986 response to *Union Gas I* to sites acquired involuntarily by states simply cannot be squared with the language or structure of the statute or any conceivable notion of public policy. As the Court of Appeals concluded on remand, in the 1986 amendments, "Congress enacted the unmistakably clear statutory language that demon-

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innocent purchaser defense even if it acquired the site involuntarily. *Id.* § 9601(35)(D).

Similarly, when money from the federal Superfund trust fund is used to help finance a site cleanup within a state, CERCLA imposes a lower initial cost-sharing percentage on a state that was merely a passive owner—particularly an involuntary owner—than on a state that operated the site and contributed to the hazardous waste problem. 42 U.S.C. §§ 9604(c)(3)(C), 9601(20)(D) (West Supp. 1988); *Superfund: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 30 (1985); *cf.* 42 U.S.C. § 9604(c)(3)(C) (1982); S. Rep. No. 848, *supra* note 4, at 58-59.

strates its intent to abrogate the states' eleventh amendment immunity" whenever a state has "caused or contributed" to the release of a hazardous substance at a site that it owned or operated.[12]

Since petitioner's assertions regarding Congressional intent are without merit, this case squarely presents constitutional issues regarding the proper interpretation of the Eleventh Amendment. We now turn to these issues.

II. The Court Should Correct Fundamental Errors in Eleventh Amendment Analysis and Declare that States Enjoy Immunity from Suit in Federal Court Only in Pure Diversity Cases.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Despite the amendment's clear focus on diversity of citizenship, the Court, since its decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), has held that a state also enjoys immunity from suits brought by its own citizens in federal court on a federal cause of action.[13]

Since the mid-1970s, a number of scholars have reexamined the historical roots of sovereign immunity doctrine and have concluded that *Hans* was wrongly decided.[14] Four Justices of this Court have repeatedly urged

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[12] Pet. App. 21a-22a (opinion below). *See United States v. Freeman*, 680 F. Supp. 73, 77 (W.D.N.Y. 1988) ("To conclude that Congress did not intend to abrogate the states' immunity to suit under such circumstances would require a contortion of the language and legislative history of section 101(20)(D)."); *Wickland Oil Terminals v. Asarco, Inc.*, 654 F. Supp. 955 (N.D. Calif. 1987).

[13] The present case falls within this category, because Union Gas Company is a citizen of Pennsylvania and the cause of action arises under CERCLA, a federal statute. J.A. 7a.

[14] *See, e.g.*, Jackson, *The Supreme Court, the 11th Amendment and State Sovereign Immunity*, 98 Yale L. J. 1 (forthcoming, Oc-

that *Hans* be overruled.[15] Last Term, concurring separately in a sovereign immunity case, Justice Scalia wrote:

> I find both the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters.[16]

The time has now come to address those questions.[17] Recent scholarship has persuasively demonstrated that *Hans v. Louisiana* rests on serious misconceptions regarding both Article III and the Eleventh Amendment. Principles of *stare decisis* do not support adherence to such a flawed precedent, notwithstanding its age. To the contrary, overruling *Hans* would permit the development of a sound doctrinal structure, consistent with the text of the Constitution, the intent of the Framers, and the principles of federalism reflected in related areas of the law.

A. The Eleventh Amendment Applies Only to Cases Brought Against States Under the State-Citizen Diversity Provisions of Article III, Section 2.

Article III, Section 2 of the United States Constitution confers two distinct types of jurisdiction on the federal

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tober 1988); J. Orth, *The Judicial Power of the United States* (1987); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983).

[15] *See Welch v. Texas Dep't of Highways and Public Transp.*, 107 S. Ct. 2941, 2962-68 (1987) (Brennan, J., dissenting); *Papasan v. Allain*, 478 U.S. 265, 292-93 (1986); *Green v. Mansour*, 474 U.S. 64, 74 (1985) (Brennan, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting).

[16] *Welch*, 107 S. Ct. at 2957-58.

[17] In contrast with the briefs of the parties in *Welch*, the brief of respondent Union Gas sets forth the reasons for this Court to overrule *Hans v. Louisiana*.

courts: jurisdiction based on the identity of the parties (without regard to subject matter), and jurisdiction based on the subject matter of the action (without regard to the parties' identity). Among the party-based grounds of jurisdiction are "Controversies . . . between a State and Citizens of another State; . . . and between a State . . . and foreign States, Citizens or Subjects" (the "state-citizen diversity clauses"). The principal grounds of subject matter jurisdiction are "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority" and "all Cases of admiralty and maritime Jurisdiction."

In exploring sovereign immunity and Eleventh Amendment issues, it is therefore useful to divide the universe of theoretically conceivable private lawsuits against states into four categories, defined by the citizenship of the plaintiff and the subject matter of the lawsuit:

(1) suits against a state by a non-citizen (either a citizen of another state or of a foreign country) that are not based on subject matter enumerated in Article III;

(2) suits against a state by one of its own citizens that are not based on Article III subject matter;

(3) suits against a state by a non-citizen, based on subject matter enumerated in Article III; and

(4) suits against a state by one of its own citizens, based on Article III subject matter.

Lawsuits in Categories (1) and (2) are outside the Article III grants of jurisdiction based on subject matter. Since Category (2) suits also are not included in any of the party-based grounds of jurisdiction, the federal courts have never had any authority to hear and decide such suits. In contrast, under Article III as originally adopted, the state-citizen diversity clauses gave the federal courts jurisdiction over Category (1) suits, which may be viewed as "pure diversity" actions against states. The Framers believed that a neutral forum should be

available to hear such disputes in the interests of "the Natl. peace & harmony." [18]

To be sure, the inclusion of "pure diversity" suits against states in Article III was controversial. Opponents of the Constitution vigorously objected that it would allow states to be brought into federal court as defendants in debt enforcement cases.[19] For precisely the same reason, some supporters of the Constitution, such as Edmund Randolph, sponsor of the Virginia Plan at the Constitutional Convention, argued that the Constitution should be applauded.[20] Other supporters, however, including James Madison, Alexander Hamilton, and John Marshall, asserted that creditors could not make states involuntary defendants in federal court. These assurances were politically expedient and may have been disingenuous.[21] In any event, since the statements of Madison, Hamilton, and Marshall could have been based on the common law defense of sovereign immunity in suits based on state law,[22] they do not support the proposition that the original Article III must be construed to exclude "pure diversity" suits against states.[23]

In contrast to the heated debate over Category (1) "pure diversity" suits, the establishment of Article III

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[18] Fletcher, *supra* note 14, at 1046 & n.55 (quoting resolution of the Constitutional Convention).

[19] *See* Gibbons, *supra* note 14, at 1902-14; Fletcher, *supra* note 14, at 1047-52.

[20] Gibbons, *supra* note 14, at 1906; *see id.* at 1907-08.

[21] Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515 (1977); Gibbons, *supra* note 14, at 1903-06, 1908.

[22] Field, *supra* note 21, at 536-38.

[23] Indeed, the ratifying conventions of several states proposed—without success—that the Constitution be amended to guarantee state sovereign immunity. Rhode Island's proposal explicitly stated that suits concerning payment of the state's public securities could not be entertained. Fletcher, *supra* note 14, at 1051-52. These amendments would have been unnecessary if "pure diversity" suits against states were outside the scope of Article III.

jurisdiction over Category (3) and (4) suits against states—those involving questions of federal law and admiralty—aroused little controversy.[24] In the Federalist Papers, Alexander Hamilton asserted forcefully that federal courts must have the power to decide suits against states in order to enforce constitutional guarantees.[25] On the anti-Federalist side, a leading pamphleteer acknowledged that the federal courts should have "the power of deciding finally on the laws of the union." [26]

Article III, in short, originally gave the federal courts power over suits against states based solely on diversity of citizenship, as well as those involving enumerated subject matter regardless of diversity. As Judge Gibbons concluded after a thorough review of the historical record, "[a] few isolated remarks notwithstanding, in those states in which the ratifying conventions discussed the issue, the best evidence is that each convention interpreted the judiciary article, as originally written, to allow the states to be sued in the federal courts." [27]

Thus, *Chisholm v. Georgia*, 2 U.S. (2 Dall. 419) (1793), correctly upheld federal power over a Category (1) pure diversity case—a suit against a state by a citi-

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[24] The Virginia ratifying convention proposed to eliminate the lower federal courts, but its amendment would have preserved Supreme Court jurisdiction over cases arising under future treaties and involving states as parties. Gibbons, *supra* note 14, at 1908. Similarly, according to Hamilton, "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." *The Federalist* No. 80, at 502 (A. Hamilton) (B. Wright ed. 1961).

[25] *Id.* at 500, 502.

[26] *Letters from a Federal Farmer*, in 14 *The Documentary History of the Ratification of the Constitution* 14, 40 (J. Kaminski & G. Saladino eds. 1983).

[27] Gibbons, *supra* note 14, at 1913. *See New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (originally, Article III permitted out-of-state citizen to sue another state).

zen of another state based on a common-law cause of action. In order to protect states from federal court enforcement of their debts, the Eleventh Amendment overturned the *Chisholm* decision. One proposed constitutional amendment would have eliminated federal court jurisdiction over federal question cases as well as pure diversity cases against states,[28] but Congress selected and the states ratified a narrower formulation. The language of the Eleventh Amendment parallels that of the state-citizen diversity clauses of Article III, the only source of federal jurisdiction over Category (1) cases.

The record surrounding the ratification of the Eleventh Amendment is sparse, but 19th-century evidence strongly suggests that the amendment did not eliminate federal jurisdiction over any suits other than those in Category (1).[29] The language of the amendment did not encompass Category (4) suits by citizens against their own states based on Article III subject matter.[30] Although the amendment eliminated diversity as a ground for federal court jurisdiction over Category (3) suits against states, it did not disturb the alternative ground, Article III subject matter. Thus, in an 1809 decision cited as good law throughout the 19th century, a Justice of the Supreme Court riding circuit upheld federal court jurisdiction over admiralty suits against states.[31] Exercising the "judicial power of the United States," the Supreme

[28] "That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States." Fletcher, *supra* note 14, at 1058-59.

[29] *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 798 (1824); Gibbons, *supra* note 14, at 1941-56; J. Orth, *supra* note 14, at 76-77.

[30] *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821).

[31] *United States v. Bright*, 24 Fed. Cas. 1232, 1236 (D. Pa. 1809) (Washington, J.); *see* Gibbons, *supra* note 14, at 1944-45; Fletcher, *supra* note 14, at 1078-83.

Court reviewed state court judgments granting or denying monetary relief sought by private persons against states on federal law grounds.[32]

In *Hans v. Louisiana*, however, the Court ignored the fundamental distinction between suits based on the subject-matter grounds enumerated in Article III and suits based solely on the state-citizen diversity clauses. The Court began with the erroneous assumption that the framers of the original Constitution had not intended to subject states to any unconsented suits by private parties in federal court. The Court further assumed that the Eleventh Amendment restored the "original understanding" by prohibiting all suits in federal court against states by non-citizens—whether or not a federal question was presented. Building on this unsound foundation, the court concluded that, even though the language of the Eleventh Amendment did not refer to suits against a state by its own citizens, it would be anomalous to allow any such suits while barring all suits against a state by non-citizens.[33] Accordingly, it held that principles of sovereign immunity also barred federal jurisdiction over suits brought by a citizen against his own state when the cause of action arises under federal law.

The anomaly perceived by the *Hans* opinion, however, did not exist. As shown above, the Framers intended to subject states to suit on federal questions in federal courts without regard to the citizenship of the plaintiff. The anti-Federalists did not question this authority; the

[32] *See, e.g., Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853); *see* Jackson, *supra* note 14. This practice has continued to the present day. *See, e.g., Employment Div., Dep't of Human Resources v. Smith*, 108 S. Ct. 1444 (1988); *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). A forthcoming article in the *Yale Law Journal* demonstrates that this Court's appellate jurisdiction over such cases is inconsistent with the proposition that Article III bars federal jurisdiction over suits against states based on federal law. Jackson, *supra* note 14.

[33] 134 U.S. at 15.

Eleventh Amendment left it in place. Only when faced with the massive problem of debt repudiation by Southern states in the aftermath of Reconstruction did the Court first decide otherwise.[34] But its analysis in *Hans v. Louisiana* was unsound and inconsistent with the supremacy of federal law. Accordingly, the Court should return to the original understanding of both Article III and the Eleventh Amendment by declaring that the Amendment applies only to pure diversity cases.

B. The Policies Underlying Stare Decisis Should Not Prevent the Overruling of *Hans v. Louisiana*.

Since *Hans* is now deemed to have been a constitutional holding, only this Court can remedy the mistake.[35] As Justice Brandeis wrote, "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning. . . ." [36]

The principles underlying *stare decisis* do not require this Court to perpetuate its historical errors in *Hans* and subsequent cases.[37] Justifiable reliance and stable expectations are not at stake here. This Court has held that governmental entities may not claim a vested interest in violating the federal Constitution and laws with

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[34] J. Orth, *supra* note 14, at 47-89; Gibbons, *supra* note 14, at 1968-2002.

[35] *See Edelman v. Jordan*, 415 U.S. 651, 671 (1974): "Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law."

[36] *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting), *quoted in Edelman*, 415 U.S. at 671.

[37] *See, e.g., Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 72-73 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872); *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 700 (1978) (municipalities may be sued under 42 U.S.C. § 1983 for violating federal Constitution or laws), overruling *Monroe v. Pape*, 365 U.S. 167 (1961).

impunity.[38] Even with regard to the financial consequences of noncompliance with federal law, existing sovereign immunity doctrine has not permitted states to develop settled expectations of non-liability. Sovereign immunity rules have been unstable and difficult to apply; they also leave states exposed to substantial financial burdens under a variety of exceptions to immunity.[39]

Any claim of justifiable reliance on sovereign immunity in federal court is further undermined by states' own policies and practices. To a substantial degree, states have recognized the injustice of refusing to allow persons harmed by tortious state action to recover money judgments in state court. In contrast to the situation in 1890,[40] the great majority of states have now con-

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[38] *Monell*, 436 U.S. at 700; *cf. United States v. Ross*, 456 U.S. 798, 824 & n.33 (1982) (any interest in status quo that might be asserted by violators of law "clearly would not be legitimate").

[39] *See Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (state must pay for remedial education program notwithstanding "direct and substantial impact on the state treasury"); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (states are subject to backpay awards for violations of Title VII of the Civil Rights Act of 1964); *Employees of the Dep't of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 286 (1973) (Secretary of Labor may bring suit for unpaid minimum wages on behalf of individual employees); *id.* at 284 ("when Congress does act, it may place new or even enormous fiscal burdens on the States").

In the present case, the Commonwealth of Pennsylvania could not justifiably have assumed that it would never be liable in federal court for a share of the costs of cleaning up the Brodhead Creek site. First, as the state admits, there is no Eleventh Amendment immunity from suit by the federal government for money damages. Brief for Petitioner at 42. Second, this Court has left open the question whether Congress has authority to subject unconsenting states to suit in federal court when it exercises its powers under Article I. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985). Pennsylvania could therefore not reasonably have relied on the absence of liability even in a suit by a private party such as respondent.

[40] Very few states had consented to tort liability and their waivers of immunity were limited in scope. A New York statute, for example, permitted recovery against the state only for certain in-

sented to at least some tort liability.[41] In rejecting continued sovereign immunity, state courts across the country have described the doctrine as unjust and anachronistic.[42] Since so many states have renounced sovereign immunity even in their own courts, where they retain a measure of sovereignty, they should certainly not be accorded a right to rely on immunity from suit in the federal courts, where they are not coequal sovereigns.[43]

Nor would preserving the reasoning and result of *Hans v. Louisiana* enhance the orderliness and stability of the law. The Court's decisions on sovereign immunity have repeatedly questioned, undermined, or overruled prior cases.[44] The Court itself has acknowledged that sover-

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juries arising from the construction or operation of canals. *Sipple v. State*, 99 N.Y. 284, 1 N.E. 892 (1885). *See Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, 24 N.E. 854 (1890); 1 T. Shearman & A. Redfield, *A Treatise on the Law of Negligence* § 249 (4th ed. 1888); Annot., *What claims constitute valid demands against a state*, 42 L.R.A. 33, 64-69 (1899).

[41] *Prosser and Keeton on the Law of Torts* 1044-45 (W. Keeton 5th ed. 1984).

[42] *See, e.g., Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107, 109, 113 (1963); *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 212, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961), *modified sub nom. Corning Hospital Dist. v. Superior Court*, 57 Cal. 2d 488, 370 P.2d 325, 20 Cal. Rptr. 621 (1962); *Willis v. Department of Conservation & Economic Dev.*, 55 N.J. 534, 264 A.2d 34, 36 (1970); *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733, 736-37 (1972).

[43] *See Owen v. City of Independence*, 445 U.S. 622, 647-48 (1980) (Congress is "the supreme sovereign on matters of federal law").

[44] *E.g., Welch*, 107 S. Ct. at 2948, 2958 (overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), with respect to state immunity from suit under the Federal Employer's Liability Act); *Green v. Mansour*, 474 U.S. 64 (1985) (limiting or rejecting *Quern v. Jordan*, 440 U.S. 332 (1979), with respect to "notice relief"); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 118-21 (1984) (overruling cases permitting federal courts to grant injunctive relief on pendent state-law claims); *Edelman*, 415 U.S. at 670 (overruling Eleventh Amendment holdings in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and three other cases).

eign immunity doctrine relies on fictions[45] and makes distinctions that are difficult to apply in practice.[46] In the law reviews, this area has been described as "little more than a hodgepodge of confusing and intellectually indefensible judge-made law"[47] and as "a complicated, jerry-built system that is fully understood only by those who specialize in this difficult field."[48] The unworkability and instability of the body of law built upon *Hans* counsel powerfully against adhering to that decision.[49]

Finally, this Court has not hesitated to overrule precedents, even if they are as old as or older than *Hans*, when it finds that they are fundamentally incompatible with more recent doctrinal developments.[50] When *Hans* was decided, the doctrine of "dual sovereignty" was firmly entrenched. Applying that theory, the Court had held that the Constitution prohibited the federal government from taxing the salaries of state employees.[51] In 1895, the Court concluded that Congress lacked power under the Commerce Clause to apply the antitrust laws to an entity that would refine 98 percent of the nation's sugar production, because manufacturing activities occurred solely within the borders of a single state.[52] Since

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[45] *See, e.g., Pennhurst*, 465 U.S. at 105.

[46] *Papasan*, 478 U.S. at 278; *Edelman*, 415 U.S. at 667.

[47] Gibbons, *supra* note 14, at 1891.

[48] Fletcher, *supra* note 14, at 1044.

[49] *See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1140-41 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985).

[50] *See, e.g., South Carolina v. Baker*, 108 S. Ct. 1355, 1365 (1988), overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2809-10 (1987), overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

[51] *Collector v. Day*, 78 U.S. (11 Wall.) 113, 128 (1871), overruled in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

[52] *United States v. E.C. Knight Co.*, 156 U.S. 1, 13-17 (1895), overruled in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

the 1890s, however, federal-state relations have changed dramatically both in practice and in constitutional theory. The federal government has extended its regulatory authority over the states themselves; at the same time, it has become a significant source of financial support for state governments. This Court has repudiated the doctrine of "dual sovereignty" [53] and has concluded that the basic protections accorded to states lie in the structure of the federal government rather than in the judicial enforcement of unwritten constitutional protections.[54]

Like *Kentucky v. Dennison*, an 1861 precedent that barred federal judicial enforcement of states' constitutional and statutory obligations to extradite fugitives, *Hans v. Louisiana* is "the product of another time" that "has stood while the world of which it was a part passed away." It should "stand no longer." [55]

III. Even if the Eleventh Amendment Is Held to Apply to Federal Question Cases, Congress May Abrogate Sovereign Immunity Without the State's Consent When It Enacts Legislation Under Its Article I Powers.

Even if the Court does not take this occasion to restore federal court jurisdiction over unconsenting states to the full extent warranted by the historical evidence, it should affirm the decision of the Court of Appeals. Congress must have full authority to implement national policy when it acts pursuant to its delegated powers. The Court should make clear that Congress may unilaterally abrogate state immunity from suit by private parties, regardless of their citizenship, when it enacts substantive statutes pursuant to its Article I powers.[56]

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[53] *See FERC v. Mississippi*, 456 U.S. 742, 761 (1982).

[54] *South Carolina v. Baker*, 108 S. Ct. 1355 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). As this Court has repeatedly acknowledged, no constitutional text accords a state sovereign immunity from suits by its own citizens. *See, e.g., Atascadero*, 473 U.S. at 238; *Hans*, 134 U.S. at 10.

[55] *Puerto Rico v. Branstad*, 107 S. Ct. at 2809-10.

[56] Recent opinions have assumed without deciding that "the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment." *Welch*, 107 S. Ct. at 2946 (plurality opinion); *County of Oneida*, 470 U.S. at 252; *see Green v. Mansour*, 474 U.S. at 68.

A. The Power to Subject States to Suit in Federal Court Is Necessary and Proper for the Enforcement of Substantive Policies Adopted by Congress in the Exercise of its Article I Authority.

The Framers believed that, to the extent that the Constitution granted lawmaking powers to the federal government, it divested the states of sovereignty [57]—the conceptual basis for sovereign immunity.[58] In justification of the Supremacy Clause, Alexander Hamilton explained in *The Federalist* No. 33 that "[i]f a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed." [59] James Madison told the members of the First Congress, "If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." [60]

In turn, both Federalists and anti-Federalists agreed that the federal courts should have the power to enforce the laws enacted by Congress. During the Virginia ratification debates, James Madison stated that, "With respect to the laws of the Union, it is so necessary and expedient

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[57] *The Federalist* No. 33, at 247 (A. Hamilton) (B. Wright ed. 1961); *see Letters from a Federal Farmer, supra* note 26, at 43 (anti-Federalist discussion of effects of supremacy clause on state laws and constitutions). *Accord Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 382 ("powers of the Union, on the great subjects of war, peace, and commerce, and so many others, are in themselves limitations of the sovereignty of the States").

[58] As Hamilton wrote in *The Federalist*, to the extent that state sovereignty had been alienated, "there is a surrender of this immunity [from suit by individuals] in the plan of the convention. . . ." *The Federalist* No. 81, at 511 (A. Hamilton) (B. Wright ed. 1961).

[59] *The Federalist* No. 33, *id.* at 247.

[60] *Garcia*, 469 U.S. at 549, *quoting* 2 Annals of Cong. 1897 (1791).

that the judicial power should correspond with the legislative, that it has not been objected to." [61] A leading opponent of the Constitution conceded that "[i]t is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the union." [62]

Thus, when Congress properly enacts legislation that applies to states, it has the corresponding power to create private rights of action in federal court to implement and enforce that legislation. The Eleventh Amendment, which refers only to the "judicial power," need not be construed to diminish Congress' power to enforce valid substantive legislation by permitting suits against states by private parties.[63]

When states are subject to the commands of federal law, suits against states for money damages are frequently necessary to implement federal statutory policies. True, this Court's precedents give the federal courts the authority to issue injunctions against state officials in order to compel prospective compliance with federal law.[64]

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[61] Fletcher, *supra* note 14, at 1074 n.170 (citation omitted). *Accord The Federalist* No. 80, at 500 (A. Hamilton) (B. Wright ed. 1961); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 384.

[62] *Letters from a Federal Farmer*, *supra* note 26, at 40.

[63] Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 693 (1976). The Eleventh Amendment was adopted to overturn *Chisholm v. Georgia*, a decision upholding federal court jurisdiction over a common law assumpsit action. In his *Chisholm* dissent, Justice Iredell asserted that Congress had not enacted any statute giving the federal courts jurisdiction to hear such actions. Accordingly, he reserved judgment on whether Congress had the power to authorize private suits against states for the recovery of money, although he expressed some doubt that the authority existed. 2 U.S. (2 Dall.) 419, 449-50 (1793). This history suggests that, at most, the Eleventh Amendment should be read as declaring that Article III did not have the self-executing effect of abrogating state sovereign immunity in federal courts. Tribe, *supra* note 63, at 694-95.

[64] *Papasan*, 478 U.S. at 278; *Ex parte Young*, 209 U.S. 123 (1908).

Nevertheless, in some instances, the payment of money to a private party is the essence of Congressional policy. The Jones Act, for example, was enacted to provide compensation to seamen injured in the course of employment.[65] Similarly, CERCLA, the statute at issue in this case, assigns the substantial costs of hazardous waste cleanups to all persons and entities that the Act defines as responsible parties. To assure that the cleanup program can be carried out as Congress intended, persons who expend funds to clean up hazardous waste sites at which states are responsible parties must be able to recover money judgments against states in federal courts.[66]

In other instances, when a federal statute adopted pursuant to Article I commands or proscribes conduct by states, the availability of money damages against noncomplying states may be necessary to deter violations of federal law and to assure that persons harmed by violations are made whole.[67] Enforcement by federal authorities may well be insufficient to assure compliance because of the limitations on federal resources.[68] Moreover, private enforcement may be ineffective if injunctive relief is the only permissible remedy against states in federal courts—particularly if Congress has given federal courts exclusive jurisdiction in order to secure uniformity of interpretation. The Copyright Office, for example, has recently reported that the Eleventh Amendment leaves

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[65] 46 U.S.C. § 688(a) (1982), incorporating remedial provisions of Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1982).

[66] Contrary to the suggestion of the state *amici*, *see* Brief of States of New York, et al. at 16 n.14, private citizens could not bring suit in state court in such cases, because Congress gave the federal courts exclusive jurisdiction over actions arising under CERCLA. *See* 42 U.S.C. § 9613(b) (1982).

[67] *See Parden*, 377 U.S. at 197-98. In contexts other than suits against states, the Court has repeatedly recognized the significance of these goals in the implementation of federal policy. *See, e.g., Owen v. City of Independence*, 445 U.S. at 651-52; *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978).

[68] *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 707-08 & n.42 (1979).

copyright owners vulnerable to "widespread, uncontrollable copying of their works without remuneration" by state institutions.[69]

Accordingly, Congress must have the option of imposing money damages against unconsenting states in order to effectuate substantive federal policies. The structure of the federal system gives states an opportunity to participate in the federal legislative process and to restrain Congressional action that might affect their institutional interests.[70] Once that process is completed, if Congress decides that national policies outweigh the states' interest in avoiding money damages, the basic structure of our federal system requires that the states should be amenable to private suits in federal court.

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[69] Register of Copyrights, U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment* 6 (June 1988).

[70] *Garcia*, 469 U.S. at 550-57; Tribe, *supra* note 63, at 694-96 & n.71, 713; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

In addition to these structural safeguards, it is common for representatives of state governments to become actively involved in the lawmaking process, as they did with regard to the 1986 CERCLA amendments. Spokesmen for various states, the National Governors' Association, and the Association of State and Territorial Solid Waste Management Officials presented their views regarding the financial obligations and liabilities of states under the Act. *See, e.g., Superfund, supra* note 11, at 523, 787; *Amending and Extending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund): Hearings Before the Senate Comm. on Environment and Public Works*, 98th Cong., 2d Sess. 130, 147, 161, 168, 218 (1984); *Superfund Reauthorization: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 529 (1984). Some of their suggested amendments on these issues were incorporated into the legislation. *See, e.g.*, Pub. L. No. 99-499, § 107(d)(2) (no CERCLA liability for state or local government for costs or damages as a result of emergency response actions, except for gross liability or intentional misconduct); § 104(f) (reduction of state cost-sharing percentage to 10 percent for facilities owned but not operated by state at time of disposal of hazardous substances); *id.* § 101(b) (*see* Part I *supra*).

B. Once Congress Has Abrogated State Immunity by Statute, There Is No Need to Find Actual or Constructive Waiver of Immunity by the State.

In *Parden v. Terminal Railway*, 377 U.S. 184 (1964), the Court appeared to endorse the foregoing analysis. The Court observed that Congress had enacted the Federal Employer's Liability Act in the exercise of its constitutional power to regulate interstate commerce, and it explained that the " 'sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . .' " *Id.* at 191 (citation omitted).

> By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity. *Id.* at 192.

Yet *Parden* also relied on an alternative rationale—"constructive waiver"—which not only conflicted with the first rationale but also engendered a confusing and unworkable body of law. The Court declared that Alabama, by entering into the business of operating a railroad some 20 years after the enactment of the FELA—a statute applicable to all "common carriers"—had "necessarily consented" to suit by private parties as authorized by that statute. *Id.* at 192. "[W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation," the Court explained, "it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.* at 196.

In subsequent cases involving Congressional enactments under Article I, the "constructive waiver" doctrine became inextricably entangled with the distinction suggested in *Parden* between "governmental" and "proprietary" functions. Relegating *Parden* to "the area where private persons and corporations normally ran the enterprise," the Court refused to apply the same rationale to

state hospitals and schools, which were "not operated for profit" and thus not "proprietary."[71] The precise relationship between the nature of the state activity and the need for waiver of immunity by the state has, however, remained elusive.[72]

As this Court has recognized in decisions both before and after *Parden*, the governmental-proprietary distinction is a quagmire. In 1946, all of the Justices agreed that the distinction was "untenable," lacked principled content, and should be abandoned as a criterion for intergovernmental tax immunity.[73] More recently, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court concluded that no principled or consistent distinctions could be drawn between activities that were or were not "traditional" or "integral" governmental functions.[74]

As in *Garcia*, the futility of attempting to apply the "constructive waiver" theory in a coherent and logically justifiable manner strongly supports a shift in the underlying doctrine.[75] The concept of "constructive waiver" may have been a valiant effort to reconcile the principle of sovereign immunity with Congress' ability to subject

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[71] *Employees*, 411 U.S. at 284; *id.* at 296 (Marshall, J., concurring); *see Edelman*, 415 U.S. at 695 (Marshall, J., dissenting); Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth*, 74 Geo. L. J. 363, 393-94 (1985).

[72] *See* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1212-18 (1978); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1418-22 (1975).

[73] *New York v. United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J., joined by Rutledge, J.); *id.* at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.* at 590-96 (Douglas, J., dissenting, joined by Black, J.).

[74] 469 U.S. at 537-47.

[75] *See Gulfstream Aerospace Corp.*, 108 S. Ct. at 1140 ("the sterility of the debate between the parties illustrates the need for a more fundamental consideration of the precedents in this area").

states to monetary damages in appropriate circumstances. But the effort is unnecessary. There is no need to impute a fictional "consent" to the states, because they have surrendered their sovereignty to the extent of Congress' delegated powers. If the "governmental" or "proprietary" nature of a given state activity has some bearing on whether states should be subject to suit, it is a factor to be weighed by Congress in the political process.[76] When Congress determines that national policies so require, it should have the power under Article I to abrogate state sovereign immunity, even if the affected state activity might not be characterized as "proprietary" and even if the state has not waived its immunity.[77]

Recognition of this Congressional power under Article I would be fully consistent with the Court's precedents establishing that Congress may abrogate sovereign immunity in statutes enforcing the post-Civil War amendments.[78] Although the Court stated in *Fitzpatrick v. Bitzer* that Congress acting pursuant to these amend-

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[76] *Cf. Garcia*, 469 U.S. at 546-52.

[77] The Court may reasonably require clear evidence that Congress intended to do so. When a statute regulates a class of entities that may include states, Congress does not necessarily intend to treat states and private persons in precisely the same manner. Nevertheless, the "clear statement rule" set forth in *Atascadero State Hospital v. Scanlon* is far too rigid. By insisting on an unequivocal statement in the language of the statute itself, the rule encourages state defendants to try to avoid unmistakable congressional intent, *see* Part I *supra*, and may compel courts to deny causes of action that were intended by Congress. Field, *supra* note 72, at 1273; *but see In re McVey Trucking, Inc.*, 812 F.2d 311, 327 (7th Cir.) ("We will not distort our obligation to be 'certain' of Congress' intent into an invitation to thwart Congress' will"), *cert. denied*, 108 S. Ct. 227 (1987); *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 422 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986). Instead of looking solely at the words of the statute, the courts should consider all evidence that reflects the purpose of the statute. Field, *supra* note 72, at 1272-75.

[78] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978); *City of Rome v. United States*, 446 U.S. 156 (1980).

ments may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts," the reference is ambiguous and certainly does not foreclose abrogation when Congress enforces other constitutional provisions.[79] In subsequent opinions, the Court has stated that it has not yet decided whether Congress has power to abrogate sovereign immunity in statutes enacted pursuant to Article I.[80]

As the Court of Appeals concluded in this case, there is no constitutionally significant distinction between the post-Civil War amendments and Article I of the Constitution with regard to the states' surrender of sovereignty.[81] In *Fitzpatrick*, the Court emphasized that " 'every addition of power to the general government involves a corresponding diminution of the governmental powers of the States.' " [82] The same analysis applies—as the Court has repeatedly acknowledged—to the powers of Congress under Article I.[83] Article I gives Con-

[79] 427 U.S. at 456 (citing two cases in which Congress had not expressly authorized private suits against states). The Court may have meant only that private citizens may not sue states in the absence of express Congressional authorization. *See id.* at 452 ("Our analysis begins where *Edelman* ended, for in this Title VII case the 'threshold fact of congressional authorization,' *id.*, at 672, to sue the State as employer is clearly present."); Field, *supra* note 72, at 1237-39. Alternatively, the Court may have been referring to Congress' power under the Commerce Clause to impose substantive obligations on states *qua* states, which had been curtailed during the same Term in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *See* Field, *supra* note 72, at 1232-35.

[80] *See* note 56 *supra*.

[81] Pet. App. 40a-45a; *see McVey Trucking*, 822 F.2d at 315-21.

[82] 427 U.S. at 455, *quoting Ex parte Virginia*, 100 U.S. 339, 346-48 (1880).

[83] *Garcia*, 469 U.S. at 548 (Article I, Section 8 causes a "sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause) to displace contrary state legislation."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-92 (1981); *Parden*, 377 U.S. at 191-92; *United States v. California*, 297 U.S. 175, 184-85 (1936).

gress plenary power over enumerated subjects and express authority to enact "necessary and proper" implementing legislation.[84] Accordingly, the rationale of *Fitzpatrick v. Bitzer* supports the Court of Appeals' decision in this case.

Over the years, this Court has developed a series of exceptions to sovereign immunity to assure the enforcement of federal law. The Court has adhered to the fiction of *Ex parte Young* because it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " [85] *Fitzpatrick v. Bitzer* rests on a similar basis. As commentators have noted, neither the language of the post-Civil War amendments nor the history of their adoption expressly indicates that they were intended to limit the reach of the Eleventh Amendment or to expand the power of the federal courts.[86]

If the Court decides to proceed in an incremental fashion in this area, rather than to declare that the Eleventh Amendment applies only to pure diversity cases against states, its next step should be to recognize Congress' authority to subject states to private suits in federal court when it deems such suits necessary to implement its authority under Article I.

[84] *See McVey Trucking*, 812 F.2d at 319-21.

[85] *Pennhurst*, 465 U.S. at 105; *see Green v. Mansour*, 474 U.S. at 68 ("the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause").

[86] *See, e.g.*, Field, *supra* note 72, at 1230; Nowak, *supra* note 72, at 1454 ("There are no extant materials from the drafting or debate of the fourteenth amendment which indicate that the framers of that amendment ever considered whether it would be possible for a private citizen to sue a state government for damages in a federal court because the state had violated the principles of the amendment.").

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

Of Counsel:
DAVID F. ZOLL
BARBARA A. HINDIN
CHEMICAL MANUFACTURERS ASSOCIATION
2501 M Street, N.W.
Washington, D.C. 20037
(202) 887-1350

July 11, 1988

NEIL J. KING
CAROL F. LEE *
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for the Chemical Manufacturers Association

* Counsel of Record